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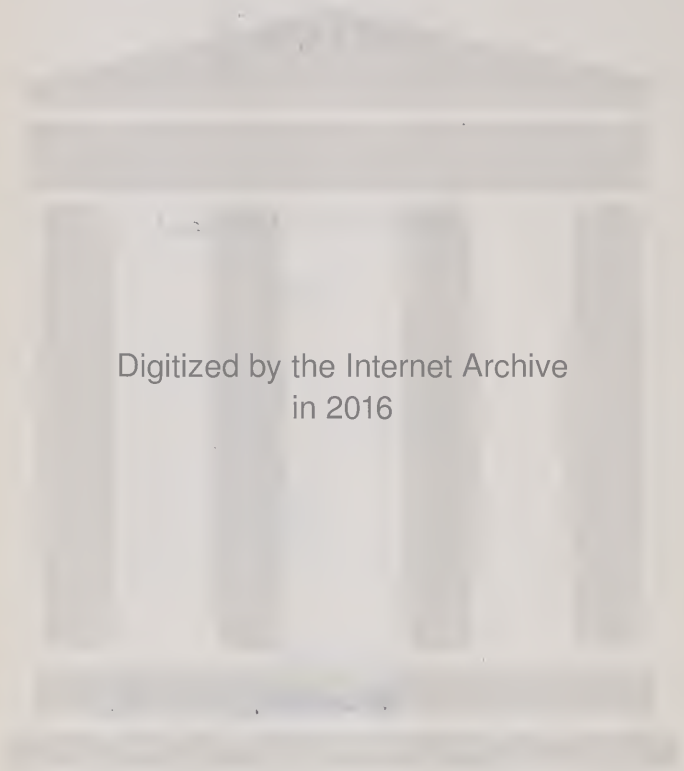

CASE No. 39.

RAUTINI SITUKUTEZI *v.* BABALAZA MAFUZO.

BUTTERWORTH: 19th January, 1949. Before J. W. Sleigh, Esq., President, Leppan and Wilkins, Members of the Court (Southern Division).

Native Appeal Case—Onus—Defendant in possession of property formerly belonging to plaintiff—In absence of admission in plea onus on plaintiff to prove how defendant obtained possession.

Appeal from the Court of the Native Commissioner, Tsomo.

Sleigh (President) delivering the judgment of the Court:

Plaintiff sued defendant for delivery of four cattle valued at £40, three goats valued at £4. 10s. and certain household goods valued collectively at £8. 18s. It is alleged in the particulars of the claim that plaintiff handed this property to defendant for safekeeping when he went to Port Elizabeth and that on his return defendant refused to deliver the property to him.

These allegations are denied in the plea. Defendant avers that he purchased two oxen and a cow, which subsequently calved, from plaintiff for the sum of £32.

The Assistant Native Commissioner absolved defendant. Against this judgment plaintiff has appealed.

The evidence fully supports the judgment, but it is contended on appeal that as the Native Commissioner ruled that defendant failed to discharge the onus of establishing his special plea of purchase, plaintiff was entitled to the four cattle in question. For this contention counsel for appellant (plaintiff) relies on the decision in Mjekevu *v.* Magezazitsho [1942 N.A.C. (C. & O.) 97] and Mvabo *v.* Qabanga reported on page 98 of the same volume. But the circumstances in these cases are entirely different. It is not clear from the report of the first case whether the defendant admitted in his plea that the horse was left with him for safekeeping, but it is clear that he eventually admitted in his evidence, or the Court found, that this was so and consequently the onus of proving the purchase and sale was on him. In the second case, defendant denied in his plea that the one beast was left with him for safekeeping, but in his evidence he admitted that he appropriated it without the consent of the plaintiff to satisfy a debt due to him by plaintiff. Clearly, therefore, in both these cases the onus was on defendants. Koyana and Ano. *v.* Koyana [1945 N.A.C. (C. & O. 54] is another case in which the defendants admitted in the plea that the stock was left with them for safekeeping, but that they had thereafter acquired it by purchase. There too the onus was on defendants because in view of the admission, no evidence was necessary to prove the contract of bailment.

Section 38 (*c*) of Proclamation No. 145 of 1923 provides that "the Court may, as the result of the trial of an action, grant absolution from the instance, if it appears to the Court that the evidence does not justify the Court in giving judgment for either party". But this Court has repeatedly held that where, on the pleadings, the burden of proof is on the defendant, it is, although competent in view of the wording of the section, illogical to grant an absolution judgment. If defendant has discharged the *onus* which rests on him he succeeds, if not, plaintiff is entitled to judgment [see also Sebogo *v.* Raath, 1947 (2) S.A.L.R. 624]. On the pleadings in the present case the burden of proof is clearly not on defendant. He never admitted in his plea or in his evidence that the cattle were handed to him for safekeeping. Had he done so no evidence to establish the contract on which plaintiff relies would have been necessary.

It is true that defendant's possession of stock which formerly belonged to plaintiff calls for an explanation, but such explanation only becomes necessary after plaintiff has proved the contract on which he relies. If he fails to do this, that is, if he fails to make out a *prima facie* case an absolution judgment at the close of his case would be competent. In the present action plaintiff has established a *prima facie* case. The onus has thus shifted to defendant to justify his possession. In our opinion defendant's evidence that he purchased the cattle must be accepted in view of the most improbable story of plaintiff, and this notwithstanding the fact that his evidence is not corroborated. Defendant was therefore entitled to a full judgment and plaintiff cannot complain because a lesser judgment was given against him.

The appeal is dismissed with costs.

For Appellant: Mr. Dold, Willowvale.

For Respondent: In default.

CASE No. 40.

GAULA KABI AND ANO. *v.* SIDLANGA CWANA.

BUTTERWORTH: 20th January, 1949. Before J. W. Sleigh, Esq., President, Leppan and Wilkins, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Marriage by Native Custom—Damages for pregnancy—Dikazi—Nkasana—*No fine is payable for the pregnancy of a widow while living at her husband's kraal—Widow who deserts her late husband's kraal and returns to her father's kraal reverts to a status of a daughter and a full fine is payable for her pregnancy—Pondo Custom—Amongst Tembus no fine is payable for the pregnancy of widow or* nkasana *unless latter is daughter of a Chief—Tembu Custom in Glen Grey district differs in regard to the second pregnancy of an* nkasana—*Among Xhosa and Fingo tribes—Fine is not payable for pregnancy of a widow—Fine of from one head to three head of cattle payable for second pregnancy of an* nkasana *but not for the third pregnancy—A woman whose marriage has been dissolved by return of dowry becomes a* dikazi—*No fine payable for her subsequent pregnancy.*

Appeal from the Court of the Native Commissioner, Willowvale.

Sleigh (President) delivering the judgment of the Court:

In this action plaintiff claims five head of cattle or their value £25 as damages for the pregnancy of his daughter, Ntombana, whose marriage by Native Custom had been dissolved by restoration of the dowry paid for her. First defendant is charged with causing her pregnancy and second defendant is sued in his capacity as kraalhead of the first defendant.

Defendants admit that first defendant is the father of the woman's child, but they deny liability on the ground that a fine is not payable in respect of the pregnancy of a married woman whose marriage has been dissolved, i.e. an *nkasana.*

The Native Commissioner held that although no fine is payable for intercourse with a *dikazi* or an *nkasana,* a reduced fine is payable if pregnancy ensues. Having held that Ntombana is a *dikazi* he gave judgment for plaintiff for two head of cattle or their value £10 and costs and defendants have appealed on the following grounds:—

1. That the judgment is wrong in law in that the Native Commissioner erred in finding that a fine is payable for the seduction and pregnancy of a woman who has previously been married and whose marriage has been dissolved. According to Native Law and Custom no such fine is payable.
2. The judgment is against the weight of evidence.

The following are the facts which are not disputed. Ntombana contracted a customary union with Mbiseni. She lived with him for some years without having any children. She returned to plaintiff's kraal and he then returned the dowry paid for her in full to Mbiseni. Thereafter first defendant had sexual intercourse with her and as a result she gave birth to a child.

This case emanates from Willowvale district which is occupied by the senior branch of the Xosa tribe, and Xosa Custom must therefore be applied. As there is apparently no reported decision in which the facts are similar to those of the present case it is necessary to review the reported decisions and try to ascertain the underlying principles which govern the recovery of fines for the pregnancy of unmarried women who are not virgins.

All the tribes in the Cape Province exact a fine for the seduction and pregnancy of an unmarried girl, but the customs of the tribes differ on the question whether a fine is payable for the pregnancy of a widow and of a woman who has never married but has had a child. Such woman is described as a *dikazi* or *nkasana.* For convenience sake I shall refer to her in this judgment as an *nkasana.*

It is accepted law among all tribes that no fine is payable for the pregnancy of a widow while living at her late husband's kraal. In Mazolo *v.* Nyangiwe (1 N.A.C. 21) the widow lived in the hut of her late husband at the kraal of the plantiff, her father-in-law. The plaintiff sued for and obtained damages for her pregnancy, but this decision was clearly bad and has never been followed. It is expected of a widow that she should continue to reside at her late husband's kraal; and if she has children while so residing they are regarded as her husband's children and cannot be acquired by their natural father on the payment of fines.

Among the Pondos a widow who deserts her late husband's kraal and returns to that of her father reverts to the status of a daughter of that kraal and a full fine is payable for her pregnancy (Dlelani *v.* Mkwayi, 1 N.A.C. 240). So also where the woman has never married but is an *nkasana.* Indeed her guardian is entitled to a fine on each occasion she becomes pregnant (see Swelindawo *v.* Myekeni, 1 N.A.C. 267 and numerous other cases). In Mkutu *v.* Mtengana (1 N.A.C. 183) it was held that a defendant who had rendered a woman pregnant on two occasions was liable to pay a fine for the first pregnancy only, but this decision (being a Pondo case) is in conflict with Swelindawo's case (*supra*).

Among the Tembus in the Transkeian Territories no fine is payable for the pregnancy of a widow or of an *nkasana* unless the latter is the daughter of a Chief [Zidlele *v.* Matshamba, 1 N.A.C. 263, Sidodo and Ano. *v.* Roboqwana, 1946 N.A.C. (C. & O.) 36]. Among the Tembus in Glen Grey district, however, a defendant would be liable for damages for the second pregnancy of an *nkasana,* if he were not the author of her first pregnancy [see the Native Assessors' opinion in Ngxabalaza *v.* Njovane, 1939 N.A.C. (C. & O.) 96].

Among the Xosa and Fingo tribes of the Cape Province a fine is not payable for illicit intercourse and pregnancy of a widow (Jama *v.* Veldtman, 1 N.A.C. 107). A fine of from one to three head of cattle is payable for the second pregnancy of an *nkasana* but not for the third pregnancy. [Mzwakali *v.* Mahlati, 2 N.A.C. 31, Maqunqu *v.* Mvakwenulu and Ano., 3 N.A.C. 259, Daniel *v.* Socinsi, 4 N.A.C. 320, Nkohla *v.* Rakana, 4 N.A.C. 321, and Sonyabashe *v.* Maqungo, 1938 N.A.C. (C. & O.) 1.] Nkohla's case came from Willowvale district.

There is thus sufficient authority for saying that among the Xosa a fine is payable for the second pregnancy of a woman who has never married, but what is the position where the customary union of the woman has been dissolved? In Sheyi *v.* Xelitole (5 N.A.C. 23) which also came from the Willowvale district, the Native Assessors stated that a woman whose union has been dissolved by the return of the dowry paid for her becomes a *dikazi.* Ntombana would likewise be a *dikazi,* but that does not assist us because a *dikazi* may be a woman who has never had a husband, or one who once had one, but has been separated from him, *or a widow who has left her late husband's place.* (See Kropf's Kaffir-English Dictionary.)

Since Kropf includes a widow in the definition of *dikazi,* and as, on the authority of Veldtman's case (*supra*), a fine is not payable in respect of a widow, it would be wrong to hold that a fine is payable in respect of Ntombana merely because she is described as a *dikazi.*

A woman who has had a child has less prospects of marriage than one who has never had a child. In any case the dowry of the former will be less. The object of fining a man who has caused the pregnancy of a girl is to compensate her guardian for this loss. Now it cannot be said that a woman whose dowry has been returned (*ketaed*) and who has since had an illegitimate child is in a better position in regard to her remarriage than a widow who has had an illegitimate child, except of course that the former may be married by the father of the child in order to legitimise it.

This latter distinction has been used by the Native Commissioner in support of his argument that a woman whose dowry has been *ketaed* should be dealt with on different principles from those involved in the pregnancy of a widow.

We are unable to agree with this argument. The fact that the illegitimate child of a woman whose dowry has been *ketaed* can be acquired by payment of *lobolo* is no ground for holding that the child can be acquired by payment of a fine in the same way as the illegitimate child of an *nkasana* can be acquired. If a child cannot be acquired by payment of a fine then it follows that its mother's father cannot enforce payment of a fine.

We are of the opinion that the Native Commissioner was wrong in treating Ntombana as if she were an *nkasana.*

It frequently happens that the dowry of a wife who has borne no children is *ketaed* and the union thus dissolved. If then it is Native Law that a fine is exacted for her subsequent pregnancy it is surprising that there is not a single case of this kind reported since the Native Appeal Court was established in 1894. We come, therefore, to the conclusion that no fine is payable for a woman whose union has been dissolved, and this view is shared by three of the five Native Assessors whose opinions are annexed. The Assessors have also made other statements, some of which are in conflict with previous decisions which statements, however, do not affect the issue in the present case.

In the summons plaintiff alleges that defendants have jointly promised and agreed to pay five cattle as damages. This allegation has not been established in the Court below and on this aspect of the action defendants are entitled to a judgment of absolution as applied for by their attorney at the close of plaintiff's case.

The appeal is allowed with costs and the judgment of the Court below is altered to one of absolution from the instance with costs.

Opinion of the Native Assessors.

Names of Assessors: J. K. Finca (Idutywa), G. Reve (Kentani), C. W. Monakali (Butterworth), Mrazulu Mlata (Willowvale) and B. Mgidi (Nqamakwe).

Question: Is there any difference between the terms "nkazana" and "dikazi"?

Answer:

Finca: A "dikazi" is an unmarried girl living at her father's kraal and who has given birth to children. An "nkazana" is a woman who has married and returned to her father's kraal—whether she has had children or not.

Mlata: I agree with Finca.

Mgidi: A "dikazi" is a young girl who has given birth to a child at her father's kraal. An "nkazana" is an unmarried elderly girl at her father's kraal whether she has had children or not. A woman whose dowry has been *ketaed* and returned to her father is called an "intombi" of her father's kraal.

Reve: To say "nkazana" means merely a female, but this term would not be used by a stranger. If a woman has had children before marriage or after dissolution of her marriage, she is referred to as a "dikazi".

Monakali: The original meaning of the word "nkazana" was merely a woman, but to-day the word means a woman who has children not during the subsistence of a marriage. A "dikazi" is a woman who has had so many illegitimate children that her father may no longer extract fines in respect of her pregnancies.

Question: Is a fine payable for the second pregnancy of a girl at her father's kraal?

Answer—Mgidi: A fine is payable for the first, second and third pregnancies. When the fine was 3 head for the first the scale was 3, 2 and 1 head respectively. I do not know what it would be to-day.

All agree except Finca who states the fines in Idutywa have always been respectively 5, 2 and 1 head.

The facts of this case are put to the Assessors.

Question: Is a fine payable? If so, what fine?

Answer:

Monakali: I have no experience of such a case, but the custom is that a fine is payable because her dowry has been returned and she has become a girl again at her father's kraal. The ordinary fine is payable as in respect of a girl who has had no children. It depends on the number of her children by her marriage whether a fine is payable, e.g. if she had one child by her marriage then a fine of two head is payable, but if she has had five children by her marriage no fine is payable, because she is a *dikazi*.

Finca: This is Xhosa custom. Once "keta" has taken place her father has a right to remarry her at whatever dowry he demands. If she is rendered pregnant after the "keta" a fine is payable even if she had children during the subsistence of the marriage—the number of these children has no bearing on the matter of payment and amount of fine.

Reve: I do not agree with Monakali or Finca. If there has been a "keta" she remains a woman. Any pregnancy subsequent to "keta" does not involve payment of a fine. Her father's only right is to remarry her and receive dowry.

Mlata and Mgidi agree with Reve.

For Appellant: Mr. Dold, Willowvale.

For Respondent: Mr. Wigley, Willowvale.

CASE No. 41.

VIVIAN MAFUNDA *v.* LEONORA XAZWE.

KOKSTAD: 26th January, 1949. Before J. W. Sleigh, Esq., President, Cockcroft and Strydom, Members of the Court (Southern Division).

Native Appeal Case—Common Law—Seduction and pregnancy—Prescription—Extinctive prescription does not run against a person under disability—Practice and Procedure—The law presumes that a spinster was a virgin before the seduction took place—Onus—To rebut presumption on other party—Damages—Seducted woman not entitled to damages arising from intercourse subsequent to defloration nor to loss of earnings—£15, *the money equivalent of fine under Native Custom not palpably inadequate.*

Appeal from the Court of the Native Commissioner, Mount Fletcher.

Sleigh (President) delivering the judgment of the Court:

Plaintiff, a spinster, sues defendant at Common Law for £150 for seduction. The parties were teachers in the Mount Fletcher district. The material allegations in the particulars of claim are as follows:—

1. Since the year 1945 the defendant from time to time, wrongfully and unlawfully seduced and carnally knew the plaintiff, and as a result of such carnal connection the plaintiff became pregnant with child in September, 1947. Prior to such carnal connection plaintiff was a virgin.
2. At all times material to this action plaintiff was a government teacher earning a monthly salary of £11. 15s. 5d.
3. Because of plaintiff's pregnancy she was obliged to, and did, resign her position as a government teacher.
4. By reason of such seduction and pregnancy, and her forced resignation as a government teacher, she has been injured in her good name and reputation, and also suffered damages materially otherwise.

Sexual intercourse with plaintiff during the year 1945 is admitted in the plea, but defendant avers that she was not a virgin at the time. Defendant denies that he is the father of plaintiff's child and puts plaintiff to the proof of the allegations contained in paragraphs 2, 3 and 4 of the summons.

The Assistant Native Commissioner entered judgment for plaintiff for £15. From this judgment defendant has appealed and plaintiff has filed a cross-appeal. One of the grounds of the cross-appeal is that "The sum of £15 awarded as damages to the plaintiff is inadequate, regard being had to the status of the plaintiff immediately prior to the pregnant condition she found herself in, and as a result thereof being compelled to resign her position as a teacher in a government school and thereby suffering substantial loss in respect of the earnings she had obtained prior to such pregnancy".

At the hearing of the appeal application was made on behalf of defendant to argue the following additional ground of appeal:—

> "That the judgment is wrong in law in that an action for damages for seduction, in terms of section 3 of the Prescription Act, 1943, becomes prescribed by the lapse of three years from the date when the seduction was committed and defendant having seduced plaintiff in February, 1945, plaintiff's action against defendant for damages for seduction was prescribed at the date of the issue of plaintiff's summons in this case on the 13th March, 1948."

The evidence goes to show that plaintiff was 22 years of age when she testified on 1st September, 1948. There is no evidence to contradict this. It follows, therefore, that she was a minor on 1st September, 1946. Since she was a person under a disability, extinctive prescription did not begin to run until, at the earliest, on 2nd eptember, 1946, which date is less than three years before the action was instituted (see section 9 of Act No. 18 of 1943). The application is consequently refused.

It is common cause that sexual intercourse between the parties took place for the first time in February, 1945. The question for decision is therefore whether plaintiff was a virgin at that time, the onus of rebutting the presumption of virginity being upon defendant. He states she was not a virgin because she was easy to penetrate, because she told him that she had had carnal connection before and because she allowed him to have connection with her. In our opinion this evidence

is not sufficient to rebut the presumption and plaintiff's evidence that she bled profusely. But counsel for defendant relies strongly on the decision in Rossouw *v.* Chetty (1939 E.D.L. 277). The facts in the present case are, however, not on all fours with the facts in that case. There the plaintiff sued for damages for seduction, for lying-in expenses and for maintenance of the child. The defendant admitted intercourse but denied paternity. The Magistrate found that the plaintiff was quite unworthy of credence, and he was not prepared to say that the defendant's story in the main was false. He gave an absolution judgment because the plaintiff's story was uncorroborated. On appeal it was urged that even if the plaintiff failed on the question of affiliation she was entitled to succeed on her claim for seduction. The Court of Appeal, however, held that it was impossible to separate the issues of seduction and affiliation. If the plaintiff was unworthy of credence, then it was not possible to accept her statement that she was a virgin when she first had carnal intercourse with defendant.

In the present case plaintiff sues for damages for seduction only. Although her witnesses proved unreliable there is no reason to disbelieve her own evidence. On the other hand defendant's evidence is also unreliable, because his statement that their relationship ceased on 8th September, 1945, is not supported by his love letters which are undated, but some of which must have been written subsequent to that date.

The important point is that he admits having had intercourse with plaintiff in February, 1945. The law presumes that she was a virgin at that time. The onus is on him to rebut the presumption and in our opinion he has not done so. The appeal consequently fails.

The cross-appeal must also fail. In the notice of appeal it is contended that she is entitled to increased damages because defendant had rendered her pregnant and as a result she has suffered substantial loss in respect of earnings which she had obtained prior to her pregnancy. This contention is unsound since the damage which a seduced woman can claim must flow from the deflowerment itself. In other words she is to be compensated for the loss of her maidenhood and the consequent impairment of her marriage prospects. She is not entitled to damages arising out of the intercourse which resulted in pregnancy subsequent to her deflowerment. Nor is she entitled to recover loss of earnings. These matters were fully discussed in Ngqaka *v.* Kula [1946 N.A.C. (C. & O.) 71].

It is further contended that in view of plaintiff's status and the position she held, the consequences of becoming pregnant are more serious to her. That may be so, but it is not a factor which the Court is entitled to take into consideration when assessing the amount of damages for seduction under Common Law.

It appears from the evidence that plaintiff was about 19 years of age when she obtained a teaching position at the same school as defendant. It is not stated whether he was the principal teacher and whether she was fully qualified. We will assume that she was qualified and that he was the principal. According to her own evidence she permitted him, shortly after they met, to have intercourse with her in her hut in the presence of three young girls. Among unmarried natives intimacy in such circumstances is not unusual, but plaintiff asks this Court to apply Common Law principles to her case. Judged by European standards her conduct is most reprehensible and unbecoming of a teacher and indicates a complete lack of modesty. At Common Law she is only entitled to be compensated for her loss of virginity. The Native Commissioner has awarded her the sum of £15 which is the money equivalent of the usual fine payable amongst most tribes for seduction not followed by pregnancy and since she has conducted herself like any ordinary native girl we are not prepared to say that the amount awarded is palpably inadequate.

The result is that both the appeal and the cross-appeal are dismissed with costs respectively.

For Appellant: Mr. Elliot, Kokstad.
For Respondent: Mr. Zietsman, Kokstad.

CASE No. 42.

MABUHLWANA NDAWENI *v.* MKUTSHWA NTSHIBANE.

KOKSTAD: 27th January, 1949. Before J. W. Sleigh, Esq., President, Cockcroft and Strydom, Members of the Court (Southern Division).

Native Appeal Case—Evidence—Civil Cases—Evidence which will convince ordinary man is satisfactory legal proof—Preponderance of probability is sufficient basis for decision—Probability must be strong and not mere conjecture or surmise.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Cockcroft (Member) delivering the judgment of the Court:

Plaintiff sued defendant for £15 as damages for the death of his black heifer, with costs, alleging that whilst this heifer was grazing on the public grazing ground defendant wrongfully and unlawfully threw a stone at it, which struck it on its side causing an injury from which the heifer died the following day.

In his plea defendant denied these allegations, and stated that on or about the 2nd June, 1948, two of plaintiff's cattle were grazing in the lands of Kunene, which cattle were on defendant's instructions driven off by plaintiff's herdboys. Defendant denies that he threw a stone at a black heifer or in any way injured it.

After hearing the evidence of both parties, the Acting Assistant Native Commissioner gave a judgment of absolution from the instance, with costs, holding that although he was satisfied that the black heifer was injured on the ribs, by a stone thrown by defendant and that the beast died the following day, yet plaintiff failed to satisfy him that the cause of death was the injury to the ribs.

Plaintiff has appealed against the whole of the judgment on the grounds that it is against the probabilities and the weight of evidence, and that the evidence adduced by plaintiff, coupled with the fact that the defendant's evidence was in conflict with his plea, was sufficiently strong to warrant a judgment in favour of plaintiff.

At the commencement of argument in this Court, Mr. *Elliot,* for respondent, conceded that defendant had struck the beast in question.

Plaintiff's evidence is to the effect that his black heifer, which was heavy in calf to a polled bull of European breed, and due to calf in the spring, was quite well when it was driven out by his herdboys to graze one morning last winter.

When it returned that evening it could hardly walk and his herdboys made a report on how it met with the injury. As a result he reported to the headman, who called defendant to his kraal. Defendant at the headman's kraal denied having injured the beast, which died on the following day, Friday. Plaintiff reported to the Police at Ibisi, and a Native Constable examined the beast after it had been skinned. The headman viewed the dead body of the heifer and gave instructions for it to be skinned. Plaintiff states that the injury was an internal one on the ribs of the heifer. The skin was not broken but there was a swelling as big as his fist. When it was skinned he also found thick blood under the skin on the hip, there being two injuries. The ribs were not broken, but the wall of flesh around the intestines was torn and the fat around the intestines was sticking to the ribs, through this rupture of the flesh. He noticed nothing wrong with the intestines. He gave it as his opinion that the shock from the blow with a stone caused the intestines to jump out at the rupture and that the second blow on the hip was inflicted with a stick.

He bought his heifer from a European and he valued it at £15.

Mzwamba Mxilibane, plaintiff's elder herdboy, deposed that defendant came along, threw his stick at a certain beast, picked up a stone about 3 inches in diameter which he threw at and struck the black heifer on the ribs, picked up his stick and struck the black heifer with it on her hip.

The heifer whose mother was bought from a European, and was in calf, became lame as a result of the injuries inflicted and was driven slowly home by itself to the kraal. The heifer never recovered from the injury and died the next day. After it was skinned he saw that the flesh between the ribs was broken and fat from the big intestines protruded between the torn flesh and the ribs, which were not broken.

Plaintiff's younger herdboy, Maqope Mabuhlwana, corroborates the evidence of his companion in every detail. He adds that the meat and the skin of the beast was eaten by the dogs. The skin on the ribs was not torn, but there was a swelling. After the skinning he saw blood on the hip, both on the flesh and on the portion of the skin covering the hip.

Farrington Tantala, the Native Constable who investigated the complaint, states that the beast was already skinned when he inspected the carcase. He corroborates plaintiff as to the nature of the two injuries, the main one on the ribs and the other on the hip. He states that he is experienced with animals and has often seen injuries on animals where the skin is not broken, e.g. where a beast pokes another causing a swelling without penetration of the skin. He saw thick blood

on the flesh and on the inside of the skin. He gives it as his opinion that a blow from a stone on the ribs as described would be sufficient to cause the death of an animal, even though the ribs were not broken.

The headman, Tshaisandle Baka, corroborates plaintiff's evidence regarding his report of the injury to his beast. Before the beast was skinned he saw only the lump on the ribs, after it was skinned, he found the flesh between the ribs was injured and full of blood. The flesh was torn and fat from the bowels was protruding through the opening. In his experience, the injury he saw could have caused the death of the beast, and he relates an instance where one of his own beasts was fatally poked by another, the difference in his case being that the skin was broken. He also saw the other injury to the hip, where there was thick blood between the skin and the flesh. From appearances, this blow on the hip struck the spinal cord.

Plaintiff's last witness was the Stock Inspector for Umzimkulu. He saw neither the injured beast nor the carcase, but states he has had considerable experience with cattle. He gives general evidence to the effect that a blow on the ribs of an animal can rupture the lining of the stomach without breaking the skin on the ribs. It is quite possible that fat from the intestines could protrude through such a rupture. A blow from a stone could cause such a rupture if force is used. A beast having sustained such an injury would find difficulty in walking. He gives it as his opinion that inflammation could not set in so quickly as to cause the death of the beast within 48 hours of receiving the injury, and the blow on the ribs as described could not have caused the death of the beast. He admits that the fact of the heifer being in calf would aggravate the injury.

An application for absolution from the instance at the close of plaintiff's case was rightly refused, and defendant alone gave evidence on his own behalf. He states that on the day the beast was alleged to have been injured he saw two strange cattle, neither belonging to plaintiff, in the land of Jenene. He denies he struck a beast and states he was not shown, in accordance with custom, the skin of the beast alleged to have died. He admits he was called to the headman's kraal on a Friday evening. Although plaintiff told him that the injured beast was still alive at his kraal, he did not go to see it. He denies he objects to other cattle grazing near his kraal.

In his reasons for judgment the presiding judicial officer states that as neither the witnesses who gave opinions on the cause of the death of the beast nor he himself is an expert, he considered it fair to absolve defendant from the instance, and thus give plaintiff an apportunity to bring a fresh action and to call expert evidence on the point. He admits he gave this judgment after having found that defendant did injure the beast and in spite of the discrepancy between defendant's evidence and his plea, and the opinions expressed by the Native Constable and the headman that the injury by the stone could have caused the animal's death.

It is difficult to visualise what expert evidence the judicial officer expected plaintiff to bring in any subsequent proceedings. The persons most likely to be able to give reliable opinions as to the cause of death of the heifer, in the absence of a veterinary surgeon holding a post-mortem examination, are unbiassed laymen with knowledge of cattle and previous experience of the effects of similar injuries as those sustained by this heifer. Greater reliance is to be placed on the evidence in this case of the Native Constable and the headman, because they actually saw the effects of the injuries sustained, when the animal was skinned. The Stock Inspector did not have this advantage, and it would be difficult for him to give a definite opinion as to the cause of death merely on a description of the blow on the ribs and of an indication of the spot where the blow landed, as was given to him in Court.

In order to tear the abdominal wall, which is protected by the resilient ribs, the stone must have been hurled with very considerable force. The Native witnesses speak of blood on the flesh and the skin at the seat of the injuries which confirms that considerable force must have been used and that the injuries sustained were severe internal ones.

As stated by Scoble in his *Law of Evidence in South Africa,* 2nd Edition, at page 177, "in civil cases the degree of evidence requisite to decide an issue was enunciated in Wildebeest *v.* Geldenhuys (1911) T.P.D. 1050, where it was decided that evidence which was sufficient to satisfy the mind and conscience of an ordinary man, so that he would venture to act on that conviction in matters of important personal interest, is satisfactory legal proof of the truth of such condition. See

also Avis *v.* Versput, 1943 A.D. 345. A preponderance of probability is a sufficient basis for decision, but the probability must be strong and not amount to mere conjecture or surmise ".

Defendant's reply to the evidence adduced by plaintiff is a denial that he struck the beast at all, but, as already indicated, his counsel conceded before this Court that he had struck the animal. There is evidence on record that a blood smear was taken, in accordance with the requirements of the Veterinary Department, but no evidence has been recorded as to the diagnosis. It is highly improbable that, if the diagnosis disclosed the presence of disease as a possible cause of death, the defendant's attorney would not have adduced this evidence on behalf of his client. Defendant has adduced no evidence whatsoever as to the possible or probable cause of the death and it is not for this Court to traverse or conjecture on the all possible misadventures or ailments that may overtake an animal grazing on the commonage. From the description of the injuries to the animal as testified by plaintiff's witnesses and in the absence of any evidence by defendant as to the possible or probable cause of death, this Court is satisfied that the preponderance of probability is in favour of plaintiff's contention that the animal died as a result of the injuries inflicted by defendant.

A factor adverse to defendant is the discrepancy between his evidence and his plea. This creates an impression on the Court that he has no genuine defence to the action.

Defendant in his evidence contends that he was not shown the skin of the beast that died, in accordance with Native Custom. But he cannot shelter behind this defence, as he admits that at the headman's kraal, plaintiff charged him with injuring his beast and that although plaintiff told him his beast was still alive at plaintiff's kraal, he nevertheless did not go to inspect it.

Plaintiff's evidence that the value of the heifer was £15 stands uncontradicted, and although this at first sight appears to be a high valuation when compared with the generally accepted value of £5 per head for *lobolo* cattle, this Court must accept plaintiff's uncontested valuation. Since the commencement of the last Great War there has been a continual rise in the value of all classes of livestock and these high values have not yet commenced to wave.

There is evidence that the heifer was purchased from a European, that it was in calf to a polled bull of European breed, and at the present time it is not unusual for heifers to fetch a price of £15.

The appeal is accordingly allowed with costs, and the judgment of the Court below is altered to read: " For plaintiff as prayed with costs."

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

CASE No. 43.

MATLALI TOBIEA *v.* ADAM MOHATLA.

KOKSTAD: 28th January, 1949. Before J. W. Sleigh, Esq., President, Cockcroft and Strydom, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Dowry—Marriage by Native Custom—Lobolo *is paid in accordance with Native Law and it is recoverable or forfeited under that law—Status of widow—She is regarded as a wife of the husband's group and this status persists even after her husband's death—Widow free to remarry —Remarriage cancels* lobolo *contract and transfers reproductive powers to second husband—Dowry—Remarriage amounts to repudiation of fromer status —Native Law decrees that the dowry paid by the first husband shall be restored to such husband's heir—Dissolution of marriage by competent Court cancels* lobolo *contract and* lobolo *is forthwith either forfeited or refundable—Dissolution by death*—Lobolo *not refundable until remarriage.*

Appeal from the Court of the Native Commissioner, Matatiele.

Sleigh (President) delivering the judgment of the Court:

In the particulars of claim it is alleged:—

1. Plaintiff is the heir according to Native Custom of his late brother, Jacob Mohatla, who died in or about the month of August, 1945.

2. In or about the year 1944 the late Jacob Mohatla married according to Christian rites one Kentie *alias* Mamonyatshi, daughter of the defendant, to whom the said Jacob Mohatla paid as dowry 15 head of cattle (or their equivalent) in respect of such marriage. There was no issue of such marriage.

3. In or about the year 1947 defendant's daughter, the said Kentie, contracted a second marriage by Christian rites with one Sidwell Leklonono Bohloko, of Likhetlane, in the district of Mount Fletcher.

4. By reason of the dissolution of the marriage by death between the said Kentie and the late Jacob Mohatla and the subsequent remarriage by Kentie to Sidwell Lehlonono Bohloko as aforesaid the plaintiff is entitled to the return of the dowry paid in respect of the first marriage by the late Jacob Mohatla to the defendant, namely 15 head of cattle (or their equivalent) or their value £75.

5. Despite legal demand the defendant neglects or refused to return the dowry paid as aforesaid.

An exception to the summons on the ground that it disclosed no cause of action was dismissed with costs. Defendant then delivered a plea in which the allegations in the summons are admitted, but he avers that the parties are Basutos, that the second marriage was contracted without his knowledge, that he received no dowry in respect of that marriage and that in the circumstances no dowry is refundable either by virtue of the dowry contract, or in law, or in equity.

When the case came to trial, plaintiff's attorney applied for judgment in view of the admission in the plea. He stated that he was agreeable to the deduction of one beast for the services of the woman. Defendant's attorney also applied for judgment. As a question of law only was involved the Native Commissioner, without hearing evidence entered judgment for plaintiff for fourteen head of cattle or their value £70 and costs. From this judgment and the ruling on the exception defendant appealed on the ground:—

> The judicial officer's ruling upon appellant's exception and consequently the final judgment herein are bad in law in as much as in the circumstances disclosed in the summons, plaintiff has no cause of action. The exception should therefore have been upheld and judgment entered for defendant.

The point for decision is whether in the circumstances disclosed in the pleadings the dowry paid in respect of the first marriage is refundable under Basuto Custom. This question was answered affirmatively in Desemele *v.* Sinyako [1944 N.A.C. (C. & O.) 17], and re-affirmed in Makedela *v.* Sauli [1948 N.A.C. (C. & O.) 17]. There is little that I can add to what was said in those two cases.

The facts in Makedela's case are very similar to those in the present case. There also both marriages were according to Christian rites and no dowry was paid in respect of the second marriage. The only difference is that the second marriage was apparently contracted with the defendant's consent.

The contract of *lobolo* (*bohadi*) is one peculiar to Native Custom. It is not necessary for the validity of a civil marriage. When, therefore, *lobolo* is paid in respect of such a marriage it is paid in accordance with Native Law and it is recoverable or forfeited under that law irrespective of the form of the celebration (Zace *v.* Tukani, 1 N.A.C. 202). By payment of *lobolo* the husband's group acquires, according to Native Custom, the reproductive powers of the woman. She is regarded as a wife of this group and this status persists even after her husband's death especially amongst the Basutos who practise *ngena*. As a widow, however, she is free to remarry either according to Native Custom or by Christian rites. Such remarriage has the effect of cancelling the *lobolo* contract and transferring her reproductive powers to the group of her second husband. When this takes place Native Law decrees that the dowry paid by the first husband shall, subject to certain recognised deductions, be restored to such husband's heir. This is so even if the woman contracted the second marriage against her father's wish, because her remarriage amounts to a repudiation of her former status and her father is bound by such repudiation whether he approved of it or not. It is true that a marriage by Christian rites with colateral payment of *lobolo*, only creates one union, and that is the Christian marriage. When such marriage is dissolved, by a decree of a competent Court, there is no subsidiary native union which must be separately terminated. See Raphute & Raphute *v.* Mametsi, N.A.C. (T. & N.) 1946 at page 19. The effect of such dissolution is also to cancel the *lobolo* contract, and

such *lobolo* is then either forfeited or refundable, as the case may be. But where the marriage by Christian rites is dissolved by the death of the husband the *lobolo* contract is not automatically terminated because according to Native Law, *lobolo* is only refundable when the wife contracts a second marriage.

The appeal is dismissed with costs.

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Walker, Kokstad.

CASE No. 44.

ALVERN NDONGENI *v.* **TUFUS NGODWANA.**

KOKSTAD: 28th January, 1949. Before J. W. Sleigh, Esq., President. Cockcroft and Strydom, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Adultery—Practice and Procedure—Presiding officer should make notes of progress of proceedings—Absolution judgment at the close of plaintiff's case—Should not be lightly granted—Adultery can be inferred from the circumstances—Defendant has to explain that his association with plaintiff's wife was innocent.

Appeal from the Court of the Native Commissioner, Mount Frere.

Sleigh (President) delivering the judgment of the Court:

In an action for £25 damages plaintiff alleges that: "Since 1941 defendant has been living in adultery with plaintiff's wife and is at present so living with her in Nkungweni Location in the district of Mount Frere." The plea is a denial of this allegation.

Plaintiff led evidence without objection and without an application to amend the particulars of claim, to prove that adultery had taken place in Ludidi's Location, Matatiele district, in 1941 in addition to adultery in Nkungweni Location in 1942. There is an indication in the Native Commissioner's reasons that plaintiff's attorney intended to apply for an amendment, but he never did. However, in this Court counsel for defendant (respondent) conceded that the allegation of adultery since 1941 is wide enough to cover evidence of adultery anywhere. After evidence had been led of adultery in 1941 and in 1942 the case was postponed. There is a note to this effect on the outside cover of the record but none in the body. The Assistant Native Commissioner should be careful to make notes in the body of the record of the progress of the proceedings.

At the resumed hearing, sub-headman Mlobi testified to adultery having taken place in Ludidi's Location in 1946. On 18th October, 1948, plaintiff closed his case. The proceedings were then postponed to enable defendant's attorney to call an important witness. When the case came on again plaintiff and Mlobi, with leave of the Court, gave further evidence. The former stated that it was sub-headman Qumrana (now deceased) and not Mlobi who accompanied him in 1941. Thereafter defendant's attorney applied for judgment of absolution from the instance, which was granted. The appeal is from this judgment, and on the ground that plaintiff had made out a sufficient case for defendant to rebut.

Dealing with an application of this nature, *de Villiers, J.P.,* in Gascoyne *v.* Paul and Hunter (1917 T.P.D. 170) said "at the close of the case for the plaintiff. therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the Court would then be: 'Is there such evidence upon which the Court ought to give judgment for the plaintiff?' The two questions have throughout a long course of practice been recognised as essentially different. When absolution is asked for, as here, at the close of plaintiff's case, the Magistrate must bring to bear upon the evidence not his own, but the judgment of the reasonable man. Renouncing for the time being any tendency to exercise a judgment of his own, he is bound to speculate on the conclusion at which the reasonable man of his conception not should, but might, or could arrive. This is the process of reasoning which, however difficult to exercise, the law enjoins upon the judicial officer."

Now it has been repeatedly stated that when a case is brought before a Court it is in the interest of justice that the matter should be brought to finality. The plaintiff should not be put to the expense of bringing a fresh action and the

defendant should not be vexed with the same question. It follows, therefore, that an absolution judgment at the close of the plaintiff's case, notwithstanding discrepancies, should not be lightly granted (Arniel *v.* Atkinson, 1941 E.D.L. 27, and Myburgh *v.* Kelly, 1942 E.D.L. 202).

The Native Commissioner says in his reasons that the demeanour of plaintiff and the manner in which he gave his evidence created a very unfavourable impression on the Court. He goes on to refer to a number of discrepancies and contradictions. But the only contradiction of any importance in the evidence of Headman Sibam that I can find is where the latter says that he was the one who opened the window and was the first to flash the torch into the hut, whereas plaintiff says that the headman looked through the window after him. The witnesses also differ as to whether there was one or two overcoats on the floor of the hut, but in a dark hut it is difficult to ascertain the number of articles, and blankets may easily be mistaken for overcoats and *vice versa*. On the other hand there are a number of important points on which the witnesses agree. They agree that they went to defendant's hut at about 11 p.m. and found it in darkness, that when the door was not opened they tried unsuccessfully to push it open, that when they looked through the window they saw defendant dressed in shirt and trousers and plaintiff's wife in a petticoat, pushing against the door from the inside, that there was only one sleeping mat on the ground, that they locked the door with a padlock which plaintiff had, and that during that night the door was forced.

Moreover, there is the uncontradicted evidence of sub-headman Mlobi, who says that in 1946 defendant and plaintiff's wife lived together as man and wife in Ludidi's Location, Matatiele district.

Can it be said that the evidence of these witnesses on these points "appears such an utter fabrication that no reasonable man could be imagined as ready to accept it", or that these witnesses have "palpably broken down"? I do not think so. A reasonable man might well hold the opposite view.

Then the Native Commissioner says: "There is no reliable evidence of how long defendant and plaintiff's wife were in the hut together, so that no presumption of adultery having taken place can be inferred." It seems to me that where a man is found with another person's wife in a dark hut at 11 p.m. in winter and they refused to open the door when requested to do so, the inference is irresistable that they were there for an immoral purpose, and that adultery had taken place. It is for them to explain that their association was innocent.

We come, therefore, to the conclusion that defendant had a case to meet, and that the Native Commissioner erred in granting a judgment of absolution at the close of plaintiff's case.

The appeal is allowed with costs, the Native Commissioner's judgment is set aside and the record of proceedings is returned to the Court below for further hearing.

For Appellant: Mr. Walker, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

CASE No. 45.

MANTSHI BEN *v.* KEYI MOCACAMBA.

KOKSTAD: 28th January, 1949. Before J. W. Sleigh, Esq., President, Cockcroft and Strydom, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Adultery—Practice and Procedure—A defendant is only entitled to a final judgment if he has proved his defence—Presiding Officer should record the tribe to which parties belong—Very strong evidence is required to establish the existence of a local custom which is at variance with well-established Native Custom.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Cockcroft (Member) delivering the judgment of the Court:

Plaintiff sued defendant for five head of cattle or their value, £25, as damages for the latter's adultery with plaintiff's wife, Mamkolomeni.

After hearing the evidence of both parties the Acting Assistant Native Commissioner gave judgment for defendant with costs.

Plaintiff has appealed against the whole of the judgment on the grounds that (*a*) the judgment is against the probabilities and the weight of evidence, (*b*) that the presiding officer erred in holding that the evidence adduced for plaintiff was insufficiently strong to discharge the onus resting upon him, and (*c*) that even if he was correct in this ruling the case put forward by the defendant did not warrant a final judgment in his favour and at most, the judgment should have been one of absolution from the instance.

In regard to the third ground of appeal the Native Commissioner has not rejected the evidence of plaintiff as false. A final judgment in favour of defendant was therefore not competent. The Native Commissioner's reasons for giving a final judgment do not assist us. It is true that defendant in an action of this nature is seldom able to produce evidence to substantiate his denial of adultery. Nevertheless, the provisions of section 38 (*b*) of Proclamation No. 145 of 1923, are clear. A defendant is only entitled to a final judgment if he has proved his defence. If the plaintiff has not proved his claim, and defendant his defence, then a final judgment in favour of defendant should not be granted, unless it is clear to the Trial Court, that there is no possibility of fresh evidence coming to light.

As will appear later in the reasons, this Court comes to the conclusion that the evidence of plaintiff must be rejected.

The evidence of plaintiff himself is to the effect that when he went away to work on the Rand in December, 1946, his wife was suckling a child, and on his return in August, 1948, he found his wife was pregnant and she was delivered of a full-time child on the 17th September, 1948. On taxing his wife she implicated defendant. Plaintiff admits that his wife's stomach (pregnancy) was not taken to defendant, and he attempts to justify this failure to follow this universal Native Custom by saying: "This is a custom of my tribe, but only in so far as it concerns virgins."

Joseph Mletshe, the headman of Mfulamhle Location, Umzimkulu, in giving evidence for defendant, corroborates plaintiff on the point that the custom of showing the stomach is one of his tribal customs, but that this applies only to virgins. Unfortunately, the record is silent as to the tribe to which the parties belong, and in this connection attention is invited to the necessity for recording this information in cases where Native Customs are involved—*vide* Mpawu *v.* Lebano [1938 N.A.C. (T. & N.) 121 at page 124]. "They (the damages for seduction, and this also stands for the damages for adultery) vary from tribe to tribe, and it is the duty of the Native Commissioner to ascertain not only the tribe in question, but their custom regarding ownership of the child born." And Ntombela *v.* Piliso [1938 N.A.C. (T. & N.) 201 at page 206] where *McLoughlin* stated: "This case presents other unsatisfactory features. Firstly, the tribe of the parties is not disclosed, so that it was not possible for the Native Commissioner to arrive at a correct award of damages which, as was indicated in Mpawu *v.* Lebano above mentioned, must not exceed the measure due under the custom applicable."

A reference to Whitfield's *South African Native Law*, 1st Edition, at page 421 *et seq.*, where he sets out the varying scales of damages for adultery exacted amongst various native tribes, further shows the necessity for judicial officers recording this information.

The question of this custom alleged to be practised by the residents of Mfulamhle Location was referred to the Native Assessors whose replies form an addendum to this judgment. The representative from Umzimkulu informed the Court that this location of the Umzimkulu district was inhabited largely by Bacas, and that they followed Baca Custom. The Assessors were divided in their opinions, the majority holding the view that the stomach of a married woman was not taken to the adulterer.

Very strong evidence is required to establish the existence of a local custom which is at variance with a well-established Native Custom, and this Court rejects this alleged custom as being contrary to well-established Native Custom.

The necessity for the proper proof of adultery has frequently been expressed in the judgment of this Court, e.g., in the case of Gweta Magwenkwe *v.* Mtiywa Mkelwana [1938 N.A.C. (C. & O.) 77 at page 80] where the Court deprecates the growing tendency in adultery cases to relax the evidential safeguards of proof imposed by early Native Custom. In that case, as in numerous other reported adultery cases, there is evidence of taking the pregnancy to defendant. At page 78, again plaintiff says: "I questioned my wife about the pregnancy and she named defendant. I took the pregnancy to defendant, but he denied being responsible.

Presumably this plaintiff means that as soon as he discovered the pregnancy he went, *as is customary* to charge defendant with it."

On this point Whitfield in his *South African Native Law,* 1st Edition, at page 418, is to the following effect: "A husband discovering his wife in the act of adultery, with her paramour, proceeds to seize from the man a blanket, stick or other article which he requires as *ntlonze* or proof of the catch. The next step is to send his wife with one or more men to the kraal of the adulterer, and there formally to report to the friends of the man the act of adultery complained of, and to demand the requisite number of cattle as compensation."

This passage shows the importance to the native mind of the formality of taking the pregnancy to the adulterer, even where plaintiff is in possession of substantial proof in the form of the *ntlonze*. The Basutos attach even greater importance to the making of a timeous report of the pregnancy to the adulterer, see the case of Charles Mapheleba *v.* Mtsekuoa Gaula [1943 N.A.C. (C. & O.) at page 21] and subsequent decisions. At page 22, Native Assessor Mordecai Baleni stated the Native Law as follows: "It is Basuto Custom that, if the report of the pregnancy is not made to the seducer, the father cannot recover damages. Even if he admits intercourse but denies paternity, he would be liable. The same rule applies with even greater force in adultery cases."

It is common cause that the woman misconducted herself during her husband's absence at the mines and she was delivered of a child of which plaintiff is not the father. Plaintiff's case rests almost entirely on the evidence of his wife. She states that her intimacy with defendant commenced about December, 1947, that he had connection with her in her hut at plaintiff's kraal on many occasions, and on three consecutive nights at the kraal of Dlangase. Her evidence of the intimacy at her own kraal stands alone and is denied by defendant. She states that a woman, Mantshenwa brought her three notes (put in) from defendant advising her that he would visit her, but Mantshenwa, when questioned at the headman's enquiry, denied all knowledge thereof. Defendant denies that he wrote them. Gasta, another witness, called before the headman as a witness for plaintiff also denied any knowledge of the alleged adultery. Apart from the fact that there is thus no corroboration of Mamakolomeni's testimony of the alleged adultery in her own hut, the witnesses on whom she relied to support her evidence in regard to the intimacy in her own hut, denied all knowledge thereof when questioned at the headman's enquiry. We consequently reject her evidence regarding the acts of adultery at her own kraal as unworthy of credence.

I turn now to the alleged adultery at Dlangase's kraal.

It was only in reply to questions by the Court that Mamakolomeni stated that she and defendant went to Dlangase's kraal where they met Tom Sipengane, his wife, and Dlangase, that they asked the latter for a place to sleep and that she and defendant slept there together on three consecutive nights. It seems clear, therefore, that his wife's alleged adultery at Dlangase's kraal did not form part of plaintiff's original case, but was an afterthought elicited through questions put by the Court. The hearing was postponed after the completion of the evidence of plaintiff's wife, and Tom Sipengane gave evidence on the resumption of the hearing. This witness did not impress the presiding officer and in our opinion his evidence is unacceptable.

Mamakolomeni states that Tom Sipengane gave evidence at the headman's enquiry. He denies this. Headman Joseph Mletshe states that his name was never mentioned to him as a witness, and sub-headman Lebuso Legasi denies that he was ever present at the enquiry.

It thus seems clear that the alleged adultery at Dlangase's kraal was a pure fabrication, in an attempt to strengthen her evidence. If this were not so, there is no explanation why Tom's wife and Dlangase, whose evidence could have been obtained by interrogatories or on commission, were not required to support her evidence.

We therefore have no hesitation in rejecting her evidence and that of Tom Sipengane as false.

Although the Assistant Native Commissioner does not specifically state that he accepted the evidence of defendant, this Court can find no reason for rejecting it, and accordingly accept his denial of the alleged adultery.

The appeal is accordingly dismissed with costs.

Opinion of Assessors.

Names of Assessors: B. Ntlabati (Umzimkulu), F. Nkomo (Mount Frere), D. Sipika (Matatiele), J. Moshesh (Matatiele) and E. Zibi (Mount Fletcher).

Question: Is it customary to report the pregnancy of a married woman to the adulterer?

Replies:

Dodo Sipika: It is not custom.

J. Moshesh: I agree.

B. Ntlabati: I agree.

E. Zibi: I agree.

Frank Nkoma: The stomach is taken to the adulterer by the husband's people.

B. Ntlabati: The woman reports her pregnancy to her lover. She goes by herself.

E. Zibi: The husband lays the charge before he institutes an action. If the adulterer desires to hear the woman, she is taken.

Question: What tribes occupy and what customs are practised in the Mfulomhle Location, Umzimkulu?

Reply—B. Ntlabati: Mainly Bacas occupy this location and Baca Custom is observed, which is also practised by the Hlangwinis.

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

CASE No. 46.

TSHUTSHUTSHU UMVOVO *v.* **KULUMELEKWAKE UMVOVO.**

KOKSTAD: 29th January, 1949. Before J. W. Sleigh, Esq., President, Cockcroft and Strydom, Members of the Court (Southern Division).

Native Appeal Case—Ejectment order—Servitude—An unregistered servitude is not binding upon the successor in title of the servient land unless he acquired the property with knowledge of the servitude—Native Custom—Heir is liable for debts and obligations of deceased—Native Law does not enact that the head of a kraal is bound to provide for colateral relatives—Transfer by executor free of encumbrance—Respective rights of legatee and bona fide purchaser—Plaintiff was given a clear transfer without any knowledge either express or constructive and he has the right to eject defendant.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Sleigh (President) delivering the judgment of the Court:

It is alleged in the particulars of claim (I omit all reference to certain claims which were abandoned) that plaintiff is the registered owner of the farm Roodewal in the district of Umzimkulu, that defendant is occupying a kraal site on the said farm, that plaintiff has given defendant notice to vacate the farm and that defendant has ignored the notice and continues to reside on the farm. He prays for an order of ejectment.

Defendant resists plaintiff's claim on the ground that in consideration for assisting plaintiff's father, Maqayekana, and his grandfather, Mvovo, with money to purchase the farm and to pay other expenses, he was given the right to reside on the farm with his children rent free for life, to graze his livestock thereon and to plough certain lands. He claims the right to remain on the farm until his contribution has been refunded to him. In a counterclaim he alleges that the purchase price of the farm was paid by Mvovo with the assistance of Mswazi, himself and others, that when Mvovo died Mswazi demanded the refund of his contributions, that Maqayekana then raised a bond of £1,000 to pay out Mswazi, that in order to pay off this bond as well as the balance of the purchase price of the farm and the expenses in connection with the administration of Mvovo's estate, Maqayekana approached plaintiff and others for their assistance and that it was agreed that, in consideration for their assistance, defendant and the other contributors with their children were given the right to remain on the farm with their stock rent free for life. He alleges further that he paid to Maqayekana in all the sum of £88. 10s.

and that plaintiff, as Maqayekana's heir, is legally liable to refund this amount. He claims payment thereof.

Plaintiff in his reply to defendant's plea and in his plea to the counterclaim, denies that defendant contributed anything. He also denies that any agreement as is alleged, was made, or that it would be binding on him even if it had been made. He avers that the persons who did assist Mvovo made a gift to him of their assistance and renounced all and any rights to any portion of the farm and also to the refund and return of their contributions.

After hearing evidence, the Assistant Native Commissioner granted the order of ejectment and gave an absolution judgment on the claim in reconvention. Against this judgment the defendant has appealed on the following grounds:—

1. That the judgment is wrong in law in that—
   (*a*) the fact that the farm Roodewal was transferred to plaintiff "in full and free property" and that the defendant's right to reside on the farm Roodewal together with his children rent free for life, together with their livestock, and to graze the livestock thereon and to plough certain lands, is not registered against plaintiff's title deed of the said farm, does not in law disentitle defendant to exercise such right, which said right was proved by uncontradicted evidence;
   (*b*) that when transfer of the said farm was registered in plaintiff's name, the evidence discloses that plaintiff was aware of defendant's aforesaid right and failing such in any event the evidence discloses that the doctrine of "constructive knowledge" of defendant's said right by plaintiff would apply in this suit.
2. That the judgment is contrary to Native Law and Custom in that it is the custom among natives to assist the head of the tribe or clan to purchase immovable property in return for certain rights or privileges on the said property, and for transfer of such property to be registered in the name of the head of such tribe or clan.
3. That the judgment on both the claim-in-convention and the claim-in-reconvention is against the weight of evidence and probabilities of the case.

Defendant is the eldest son of the sixth wife of the late Mvovo and plaintiff is the eldest son of Maqayekana who was the eldest son of Mvovo's first wife. It appears from the evidence that about sixty years ago Mvovo came from Natal with his family and other relatives including Mswazi and that they bought the farms Spitzkop and Roodewal in Umzimkulu district. In 1904 the two farms were registered in the name of Mvovo. In 1908 he executed a will bequeathing the said farms to Maqayekana subject to the condition "that he (Maqayekana) shall be bound to bear all liabilities as head of the kraal of the said late Umvovo, which Native Law enacts, and he shall be bound to support and look after the chief wife and her family of the said late Umvovo". Mvovo died about 1921 and in 1922 the properties were transferred to Maqayekana subject to this condition. Maqayekana apparently sold a portion of the farm Spitzkop and bequeathed the remainder, as well as the farm Roodewal, to plaintiff. He died in 1934 and in July, 1935, the farms were transferred to plaintiff, subject to the same conditions as above.

It is common cause that when Mvovo died there was still a balance of £600, more or less, owing on the farms. It is stated that this amount was raised on bond. In addition the expenses of administering his estate amounted to £300. About this time Mswazi demanded a refund of the amount contributed by him. In order to pay him out a further sum of £1,000 was raised on bond.

Defendant's witnesses state that when Mvovo bought the farms it was agreed that all the relatives should contribute towards the purchase price and that they would then have the right to live on the farms with their children. Defendant says that he worked for Mvovo and in this way contributed towards the purchase price and that Mvovo allotted him a kraal site and six arable lands. I do not think that he can claim that he was included in the agreement, as he was at the time of the purchase of the farms a small boy and his earnings would, in accordance with Native Custom, have belonged to Mvovo. He would have been entitled to remain on the farms not because he contributed towards the purchase price, but because he was Mvovo's son. Mvovo could, in consultation with the family, have ejected him for grave misconduct without compensation. His right to remain on the farms must therefore be based on his agreement with Maqayekana.

The defence witnesses go on to say that after Mvovo's death Maqayekana called a meeting of relatives and informed them that there was a balance due on the farms and asked them to help him in the same way as they had helped Mvovo and promised that they could stay on the farms on the same condition as before. It is clear that at this time Mswazi also assisted with the payment of the balance of £600, but did not contribute towards the estate expenses. It seems that later when Mswazi demanded a refund of the amount he had contributed, Maqayekana called another meeting of relatives which was attended by defendant. The witnesses state that Maqayekana then fixed the sum of £8. 10s. per annum as the amount each kraalhead had to pay in order to liquidate the bond of £1,000, and that when all the debts were paid they calculated that each contributor had paid £88. 10s. They state further that defendant paid this amount and it is clear that defendant has never abandoned his right to remain on the farm Roodewal by leaving it permanently. The Assistant Native Commissioner was satisfied that defendant did contribute towards the liquidation of the bond of £1,000, but was not satisfied that he contributed £88. 10s. because this amount is not a multiple of the sum of £8. 10s., which sum defendant states he always paid, never more, never less. In this Court, however, counsel for plaintiff (respondent) concedes that the uncontradicted evidence that defendant paid £88. 10s. must be accepted. We agree with this. It is true that defendant says that his contribution towards the liquidation of the £1,000 bond was always £8. 10s. per annum, but nowhere does he say that his annual contribution towards the payment of the £600 bond and the estate expenses was also £8. 10s. Indeed it is quite definite that he could not have contributed £88. 10s. towards the payment of the £1,000 bond, because his witness, Sibuse, says that this bond was paid in five years. It seems clear that what the witnesses mean is that they first contributed towards the liquidation of the £600 bond and the estate expenses, and when Mswazi demanded a refund Maqayekana raised the kraalhead contribution to £8. 10s. per annum.

These are the facts. I turn now to the legal issues, but before doing so, I must deal with the contention by counsel for plaintiff. He contends that the agreement between defendant and Maqayekana is so vague and uncertain that it is unenforceable. He points out that it is not stipulated how many wives of defendant could reside on the farm, what stock he could graze and whether it was intended that defendant's children also could live on the farm until their death. It is true that the defence witnesses are not unanimous as to the terms of the agreement, but defendant's evidence on this point is quite definite. He says: "I gave the money to Maqayekana when Maqayekana promised that I could stay on the farm for my life with my children and my livestock." He thus claims that Maqayekana had conferred upon him the right to live on the farm (naturally with his wives) with his children and all his stock. He does not claim that his children had the right to live there after his death. In my opinion there is no uncertainty about this agreement.

According to the evidence, Maqayekana granted defendant the right of occupying the kraal site, of cultivating the lands allotted to him and of depasturing his stock on the common grazing ground. The exercise of this right results in a diminution of full ownership and therefore the right constitutes a servitude which is personal to the defendant, terminates with his death and cannot be transmitted to his heirs. In Willoughby's Consolidated Co., Ltd., *v.* Copthall Stores, Ltd. (1918 A.D. at p. 16) *Innes, C.J.,* said: "Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than a contract of sale of land passes the *dominium* to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram lege loci* by an entry made in the register and endorsed upon the title deeds of the servient property." It is thus clear that an unregistered servitude does not confer a right *in rem* upon the grantee. In other words, an unregistered servitude is not binding upon the successor in title of the servient land unless he acquired the property with knowledge of the servitude (*Maasdorp's Institutes,* Vol. II, 4th Ed., p. 225, and Potgieter *v.* Zietsman, 1914 E.D.L. 32). As will be seen presently there is possibly another exception to this rule.

Now the only special condition registered against the title deed is the stipulation that "he (Maqayekana) shall be bound to bear all liabilities as head of the kraal of the said late Umvovo which Native Custom enacts, and he shall be bound to support and look after the chief wife and her family of the said late Umvovo". As head of the kraal he is liable, according to Native Law and Custom, for his

father's debts and obligations. But it is clear that at the time of Mvovo's death there was no debt or obligation due to defendant. As I have said, his right to remain on the farm must be based on his agreement with Maqayekana. Native Law does not enact that the head of a kraal is bound to provide for colateral relatives. If it were intended that Maqayekana should provide for the deceased's widows the endorsement would have said so and would not mention the chief wife only. The endorsement against the title deed does not, therefore, secure defendant's right to remain on the farm. It is clear that when the agreement was entered into between defendant and Maqayekana plaintiff was a small boy. It is therefore almost certain that he had no personal knowledge of the agreement. He says that he does not know under what conditions defendant lives on the farm. He was a minor when the farms were transferred to him, but it is clear that for about ten years after he became a major, during which period defendant lived on the farm openly, he took no steps to eject defendant or question his right to remain on the farm. Counsel for defendant contends that in view of this open occupation of part of the farm by defendant, plaintiff had constructive knowledge of the servitude. In support of this contention he relies on the case of Snyman *v.* Mugglestone (1935 C.P.D. 565). I do not agree with this contention. It is a very common practice for natives to permit relatives to reside on their properties. The mere occupation by a native of part of the property of a relative would never convey to another native that the property is burdened. In view of the *dictum* in Erasmus *v.* du Toit (1910 T.S. 1037) that the doctrine of constructive notice must be adopted, if at all, with very great caution, this Court would not be justified in holding that plaintiff had constructive knowledge of the servitude.

He further contends that a testator is presumed not to intend to bequeath the property of another. Where a thing common to the testator and another person is bequeathed, the presumption in a case of doubt is that the testator intended to bequeath only his share in the thing (Estate Brink *v.* Estate Brink, 1917 C.P.D. 612). The presumption is, of course, correctly stated but the rule does not assist defendant because the ownership of the farm was not common to Maqayekana and defendant. It certainly cannot be contended that Maqayekana would have had no right to bequeath the whole farm if defendant had been the lessee.

Finally he contends that a testator cannot transmit to his heir a right greater than that which he himself possessed. Reference was made to Galant *v.* Mahonga (1922 E.D.L. 69). That is an interesting case. It propounded a rule which, as I have already said, constitutes a possible exception to the general rule that an unregistered servitude does not bind a successor in title who has no knowledge of the servitude. In that case the testators bequeathed a farm to their son Stephen with the proviso that their daughter, the plaintiff, shall have the right to reside on the farm until her marriage. At the time of the death of the surviving testator, the plaintiff was living with a man but was not married. The plaintiff was not aware of the terms of the will, and Stephen who was also the executor transferred the farm to himself without an endorsement on the title of the plaintiff's rights. Stephen thereafter sold and transferred the farm to Mahonga who, being ignorant of plaintiff's rights, prosecuted her for trespass and had her ejected. She remained ignorant of her rights under the will until six years after she had been ejected. She then brought an action for reinstatement. It was held by *Sampson, J.*, that the plaintiff's right as legatee could not be defeated by the action of Stephen, as executor, in transferring the farm to himself, as legatee, in full and free property, and subsequently selling to the defendant, the sale by Stephen as executor, not being a forced sale to pay the debts of the estate.

The learned Judge in the course of his judgment said that if the plaintiff is to succeed it must be by the protection which the law gives to legatees in spite of a clear transfer of the subject matter of the legacy to a stranger. The learned Judge went on to quote *de Villiers, C.J.*, in four cases as follows: viz., in Booysen *v.* Trustees Colonial Orphan Chambers and Others (F. 2880, p. 48): "It is no doubt quite true that besides the personal action which the legatee has under the will against the heir or executor, he also possesses certain real rights by virtue of which he may either bring an action *in rem* to recover the subject of the legacy itself, or may institute an hypothecary action in respect of property belonging to the estate of his testator"; in Lange and Others *v.* Liesching (F. 1880, p. 55): "An absolute transfer to a bona fide purchaser from the executors or from the transferee of the executors, ought to debar any legatee or fideicommissary heir of the deceased from thereafter claiming the property thus transferred as his own"; in Oosthuizen's Tutrix *v.* Moffat and Another (5 S.C. 319): "An executor selling part of the estate administered by him to a bona fide purchaser does not make the transferee liable

to rights under a will not referred to in the transfer unless the beneficiary can show that the sale was not necessary for payment of the debts of the estate, and that the purchaser knew that there was no such necessity"; and lastly in Haupt *v.* van der Heever's Executor (6 S.C. 49): "The right of the legatees, it may be fairly urged, is a right entitling them to a *rei vindicatio* (excepting of course in the case of a sale by an executor)."

The learned Chief Justice thus draws a distinction between a transfer from an executor to an heir or a legatee, in which case another legatee may vindicate the subject of his legacy, and a transfer from an executor to a bona fide purchaser free of encumbrance, in which case the legatee cannot vindicate the property. *Sampson, J.*, draws the same distinction. He says: "There is this difference, that in selling he (the executor) might be entitled to sell without the encumbrance, and in that event was authorised by law to give clean transfer, whereas in transferring to a legatee without mention in the transfer of the encumbrance attached to the thing transferred, he would be acting beyond his authority as executor, and transferring more than he had the right to convey, and the transferee of such person would be in no better position, whereas in a sale to pay debts the presumption would be open to the transferee of the purchaser, as indicated by *de Villiers, C.J.*, in Lange's case. The rule, therefore, is that an executor cannot deprive a legatee or heir under a will of any rights which they may possess under it by an act of his, save when under a forced sale to pay debts he has to sell and transfer the subject-matter of their right without its reservation, and any such bona fide sale is presumed to be necessary for the liquidation of the estate."

If, therefore, in the present case, the servitude had been bequeathed to defendant and the executor had given plaintiff a clean transfer, the latter would not be protected by the general rule in regard to unregistered servitudes. But defendant's right to the servitude is founded on agreement. Counsel for appellant (defendant) contends that there is no difference in a grant *inter vivos* and a bequest. He refers us to the case *Ex parte* Levy and Another reported in Bisset & Smith (1932, p. 183). The full report of the case is not available, but it appears from the digest that all that case decides is that the interpretation of a condition in a deed of donation and in a will is the same. We can see no justification for extending the distinction drawn by *Sampson, J.*, to a person entitled to a personal servitude granted *inter vivos*.

Plaintiff has been given a clear transfer without any knowledge, either express or constructive, of defendant's rights and consequently he is not bound to suffer the burden on his property. The appeal against the judgment in convention consequently fails.

I turn now to the appeal against the judgment on the counter-claim. Counsel for defendant admits that the claim for refund of the amount contributed by defendant is based on breach of contract, and counsel for plaintiff admits that defendant is entitled to compensation. He asks us to assess the amount. We find ourselves quite unable to do so. Defendant contributed the sum of £88. 10s. and he is entitled to reasonable interest on this amount. On the other hand he has had the use of part of the farm for about 25 years since the agreement was made. We cannot even hazard a guess at his expectation of life. Moreover he is entitled to compensation for buildings and fences and we have no means of ascertaining the value of these. We are therefore unable to disturb the judgment of absolution. We hope, however, that the attorneys of the parties will be able to persuade them to come to a settlement without further litigation.

This has been a difficult case involving a good deal of research. In dismissing the appeal the Court will, application having been made, award costs on the higher scale.

For Appellant: Mr. Elliot, Kokstad.
For Respondent: Mr. Zietsman, Kokstad.

CASE No. 47.

LUZILE NGUNGUBELE *v.* NOSENDE NOMFEDELE.

PORT ST. JOHNS: 3rd February, 1949. Before J. W. Sleigh, Esq., President, King and Nel, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Dowry—Eldest daughter—Father may deal with it as he pleases—May not disinherit heir under pretext of apportionment of dowry.

Appeal from the Court of the Native Commissioner, Flagstaff.

Sleigh (President) delivering the judgment of the Court:

Plaintiff is the eldest son and heir of the late Nomfedele and second defendant is his younger brother. Nomfedele had only one daughter, Tembani. After her marriage he *nqomaed* two cattle, being part of the dowry, to first defendant. These increased to six. After two had been slaughtered, first defendant delivered the balance to second defendant and received his *nqoma* share. Plaintiff now sues defendants for the four cattle or their value £20.

Defendants plead that the two original cattle were allotted to second defendant by Nomfedele during his lifetime and were *nqomaed* to first defendant on behalf of second defendant.

The Native Commissioner found that the allotment of the two original cattle by Nomfedele to second defendant had been proved. With this finding we agree since all the leading members of the family support defendant's case. But the Native Commissioner held further that it was not competent for Nomfedele to apportion any part of Tembani's dowry to his other sons, because she was his eldest and only daughter. In coming to this decision he relies on the opinion of the Native Assessors in Tsibiyana *v.* Nyangeni (reported on page 45 of Whitfield's *South African Law*) and in Sigwaca *v.* Sigwaca [1939 N.A.C. (C. & O.) 157]. In these cases the Native Assessors stated that a man may not apportion his ldest daughter. The Native Commissioner asserts that if a father is not permitted to apportion his eldest daughter it follows that he cannot apportion her dowry.

The Native Commissioner's reasoning is not sound. It is not an uncommon practice for a father to earmark for, or allot stock to, a younger son, which stock the latter will inherit upon his father's death (see e.g. Magadla *v.* Magadla, 3 N.A.C. 28). In making such allotment he may use any stock he owns. I am not aware of any decision in which it was held that a father may not divide the dowry of his eldest daughter among his sons. In Sigwaca's case, *supra,* after the Native Assessors had stated that the eldest daughter is not allotted and belongs to her father, Lumaya Langa said: "The eldest daughter's dowry is used to help his sons when they marry their wives." This clearly indicates that the father may deal with the dowry of the first daughter as he pleases. In making the allotment he must, of course, act reasonably and in consultation with the members of his family, because an heir may not be disinherited under a pretext of apportionment. But subject to this limitation a man may do with his property what he likes.

At the request of counsel for the parties the question was referred to the Native Assessors, although I did not consider that it was necessary. It will be seen from their opinion, a record of which is annexed, that they agree with what was said by Lumaya Langa. They attempt to draw a distinction between an allotment of a portion of the dowry and a gift. I regret I am unable to appreciate this subtle distinction. It seems to me that the principle that the father who owns the daughter's dowry may dispose of it as he pleases, whether by way of allotment, apportionment or gift, must prevail.

The appeal is allowed with costs and the judgment of the Court below is altered to one for defendants with costs.

Opinion of Native Assessors.

Names of Assessors: Ndabuka Cetywayo (Lusikisiki), Makozonke Ntshubantaba (Port St. Johns), Madlomya Tansi (Tabankulu) and Tolikana Mangala (Libode).

Question: A man has one daughter and three sons. Is it competent for the father to allot two of the dowry cattle received for the daughter to the second son?

Answer (per Tolikana Mangala): No.

Other Assessors agree.

Question: In Sigwaca *v.* Sigwaca heard in 1939 Native Assessor Lumaya Langa stated: "The eldest daughter's dowry is used to help his sons when they marry their wives." Do you disagree with this statement?

Answer (per Tolikana Mangala): I agree with that statement—a man can make a gift of the girl's dowry to anyone—even to a stranger.

The other Assessors agree.

He is asked to explain the apparent inconsistency of the above replies and states: "When I say I allot (*ukwaba*) you this beast it means the allottee must

take care of the girl or married woman and give her presents when they are required. When I say I make a gift (*isipo*) no duty or responsibility attaches to the donee."

The other Assessors agree.

Question (per Mr. F. C. W. Stanford): "Can a father give a portion of the dowry of an only or eldest daughter to a minor son as a gift?"

Answer (per Madlonya Tansi): Yes.

The other Assessors agree.

Question (per Coram): Can he give all the dowry of the daughter to the second son?

Answer (per Madlonya Tansi): No.

All the other Assessors agree.

For Appellant: Mr. C. Stanford, Lusikisiki.

For Respondent: Mr. F. C. W. Stanford, Flagstaff.

CASE No. 48.

DODD MZOZOYANA *v.* MYRA MADINGA.

PORT ST. JOHNS: 3rd February, 1949. Before J. W. Sleigh, Esq., President, King and Nel, Members of the Court (Southern Division).

Native Appeal Case—Seduction—Common Law—Corroboration of woman's testimony—Quantum *damages—In making award presiding officer must take into consideration all the circumstances of the case—Amount awarded not limited to amount recoverable under Native Law, but must have some relation to it—When Appeal Court will interfere with discretion of Trial Court on question of damages—Amount reduced.*

Appeal from the Court of the Native Commissioner, Flagstaff.

Sleigh (President) delivering the judgment of the Court:

Plaintiff, a school teacher, sues defendant, also a teacher, for £90. 15s. as damages for seduction and medical expenses in connection with her pregnancy and confinement.

The Native Commissioner gave judgment for £51. 15s., being £50 general damages and £1. 15s. lying-in expenses.

This judgment is attacked on appeal on the grounds (1) that it is against the weight of evidence and the probabilities, and (2) that the amount awarded is excessive.

Plaintiff is the only witness to testify to the actual seduction. Her story hangs together well and in our opinion the Native Commissioner was justified in accepting it. Even so, the law requires that her testimony must be corroborated by evidence *aliundi* which, in some degree, is consistent with her testimony and inconsistent with the denial of defendant. The first question is, therefore, whether there is such evidence.

It is not disputed that before she became pregnant at the end of 1946 she obtained special leave from the Department of Education to take a course in needlework during 1947 at the training institution at Tigerkloof, which place is near the border of the Transvaal. There is no doubt that defendant was aware of this. Plaintiff states that when she became pregnant she informed defendant who suggested that she should leave her home and go away. Acting on his suggestion she apparently pretended, when leaving home on 3rd February, 1947, that she was going to Tigerkloof, but she did not. She first went to Umtata, thence to Herschel and thereafter to Port Elizabeth where she had the baby. Defendant admits that he received two letters from her from Umtata and that he wrote to her. His letter was produced at the trial and contains the following passage: "That place (Umtata) is often visited by our people you shall soon be found out. Your aunt (defendant's wife) returned on Tuesday as you went away on a Monday. So do not write very often as there might be trouble, but when there is a change of address I should be early informed." It is thus abundantly clear that he knew that she was in hiding, that he warned her that her presence at Umtata would be discovered and that he anticipated trouble with his wife should the latter become

aware that he was writing to her. He admits that he was a party to her concealment. His explanation for his part in the matter is that plaintiff was often ill, that she blamed her step-mother for her illness, that she decided to go away so as to be out of reach of her mother's mischievous influence, and that she asked him not to disclose her address. If his explanation is true then plaintiff would have been perfectly safe at Tigerkloof and there would have been no necessity to conceal anything, since he states that he did not know that she was pregnant. In the circumstances his explanation for concealing her address must be rejected, and plaintiff's explanation that she was concealing her pregnancy at the suggestion of defendant must be accepted. His suggestion that she should go into hiding leads naturally to the inference that he was responsible for her condition. The letter, therefore, affords that corroboration which is required by law and the appeal on the merits consequently fails.

In regard to the second ground of appeal I have no fault to find with the sum awarded for lying-in expenses. Although she produced no receipts, there is no reason to doubt her evidence that she paid £1. 15s. in connection with her confinement.

In regard to the balance of the award, the Native Commissioner states as his only reason for awarding £50, "It is considered that £50 is sufficient as damages as this is the usual amount *claimed* in these cases." I am not aware that this is so, nor that this amount is usually awarded. In any event, this is not the right approach to the subject. A seduced woman is entitled to compensation for loss of her maidenhood and the consequent impairment of her marriage prospects. She is not entitled to loss of earnings. In assessing the award for seduction under Common Law the court *a quo* has a discretion and in the exercise of this discretion it should take into consideration all the circumstances. Among the factors to be taken into account are the age of the plaintiff, her condition in life, the means adopted to overcome her resistance, her moral standing, indeed "her whole personality". The sum assessed is not governed by the amount usually claimed in such cases, nor is it limited to the amount recoverable under Native Law [*Ex parte* Minister of Native Affairs *in re* Yako *v.* Beyi, 1948 (1) S.A.L.R. at page 401]. But, as was pointed out in Bukulu *v.* Cebisa [1946 N.A.C. (C. & O.) 45] the amount so awarded should have some relation to the amount which natives in their own courts regard as adequate.

Now plaintiff is a teacher 30 years of age. She must therefore have been aware of the risks she was taking. According to her evidence she lived for a time at the kraal of defendant who is a married man. She states that defendant made advances to her shortly after she commenced teaching at his school, and, apparently, without much persuasion, agreed to *metsha* with him. She states that they *metshaed* frequently in the school building during the day time over a period of three years before he had full intercourse with her. It cannot therefore be said that here we have a refined sensitive girl who has been deflowered by a profligate. Her adulterous intercourse under the very nose of defendant's wife in a building which is frequented by the public indicates a low moral standard. I am of opinion, therefore, that the amount awarded is excessive.

It is an accepted principle that an appellate tribunal should be slow to interfere with the discretion of a Trial Court in the question of the *quantum* of damages. This principle was discussed in Sandler *v.* Wholesale Coal Supplies, Ltd. (1941 A.D. at page 200). After referring to various authorities, *Watermeyer, J.A.*, said: "A Court of Appeal should not interfere unless there is some striking disparity between its estimate of the damages and that of the Trial Court, and further unless there is some unusual degree of certainty in its mind that the estimate of the Trial Court is wrong."

Now although plaintiff is a teacher and therefore must have some social standing in the area where she lives, her moral standing is low. She practises *metsha* like other unmarried native girls. There is therefore no justification for awarding her an amount for defloration in excess of the sum of £25 which is the monetary equivalent for the damages recoverable under Native Law. Moreover, it appears that she is also claiming damages for loss of future earning capacity. In her summons she claims damages for injury to her good name and reputation and for loss of virginity and her post as a teacher, and in her evidence she says: "I sustained damages in the sum of £85 for loss of virginity and loss of my position as a teacher." It is impossible to say from the Native Commissioner's reasons whether this factor was taken into consideration in arriving at his award. If he did, it must be pointed out that plaintiff is not entitled to damages for loss of earnings or of her employment [Ngqaka *v.* Kula, 1946, N.A.C. (C. & O.) 71].

Taking all the circumstances into consideration it seems to us that an award of £25 will be adequate. This amount differs substantially from that awarded by the Trial Court. The appeal consequently succeeds on this point.

The appeal is allowed with costs and the judgment of the Court below is altered to one for plaintiff for £26. 15s. and costs.

For Appellant: Mr. Birkett, Port St. Johns.

For Respondent: Mr. F. Stanford, Flagstaff.

CASE No. 49.

UMTATA: 11th February, 1948. Before J. W. Sleigh, Esq., President, Kelly and Mundell, Members of the Court (Southern Division).

Native Appeal Case—Estate enquiry—Litigant must exhaust his remedies in the Lower Court—No procedure prescribed for reaping—Native Commissioner acts in administrative capacity—Can recall his decision if not acted upon by Registrar of Deeds.

Appeal from the Court of the Native Commissioner, Umtata.

Sleigh (President) delivering the judgment of the Court:

This is an inquiry in terms of section 3 (3) of Government Notice No. 1664 of 1929 to determine the person who is entitled to succeed to Garden and Buildings Lots No. 245, situate in Location No. 16 called "Sitebe" in the district of Umtata, and registered in the name of Mbovani Xoto. There are two claimants, namely, Mcatalala, the son and heir of the late Merane, and Nolevi, the surviving widow of Mbovani. The former contends that his father was the only son in the great house of Mbovani, whereas Nolevi maintains that Merane was the illegitimate son of Mbovani who never married Nobosisi, the mother of Merane. She claims that she, as the only wife of Mbovani, is entitled to the use and occupation of the lots. The only question in issue is therefore whether Mbovani contracted a customary union with Nobosisi.

The Assistant Native Commissioner summonsed the parties and their witnesses to appear before him on 1st July, 1948. On this date the parties appeared and some irrelevant evidence was adduced. There is, however, evidence that Merane lived and died at the kraal of Mbovani who was called "the father of Merane" and that Nobosisi was lawfully married to Mbovani and continued to live at his kraal for some time after his death. But one looks in vain for evidence that he paid dowry for her and that she was not merely a concubine. After this evidence the inquiry was postponed to 9th July, 1948.

At the resumed hearing Nolevi and her witnesses were in default. Evidence was given by one Gadini, a cousin of Merane, who states that he lived at Mbovani's kraal and knows that Nobosisi was his wife. He says that she left Mbovani's kraal on account of a quarrel before his death leaving Merane behind.

It is clear that the Native Commissioner tried to ascertain the reason for Nolevi's default. The evidence was to the effect that she was in the location and that all the parties understood that the inquiry would be continued on 9th July, 1948. The Native Commissioner then declared Merane to be the legitimate son of Mbovani and his son Mxatala (Ncatalala) to be entitled to the transfer to him of "lot 245/16". From this decision Nolevi has appealed on the following grounds:—

> That second claimant and her witnesses, including Silomtweni Mbovani, were afforded no opportunity of giving evidence in support of second claimant's claim, in that, after first claimant and his witnesses had led evidence on the 1st July, 1948, the inquiry was adjourned until the 9th July, 1948, but that second claimant and her witnesses were not told, and did not have explained to them that proceedings would continue on the 9th July, 1948; that they accordingly did not appear on the 9th July, 1948; and that they learned of the decision at a later date.

At the hearing of the appeal, counsel for appellant in reply to the Court states that he does not rely on any irregularity in the proceedings, but submits that the Native Commissioner's decision should be set aside so as to enable appellant to put her case before the Court. He applies for a postponement of the hearing of the appeal so that affidavits, properly executed, could be lodged giving the reasons for her default.

There is no judgment, order or pronouncement of the Native Commissioner which is attacked on appeal. Although section 15 of Act No. 38 of 1927 does empower this Court to direct a case from a Native Commissioner's Court to be retried or reheard, a litigant must exhaust his remedies in the Court below before he can seek relief in this Court on any matter which is not otherwise appealable. It is true that the estate regulations do not make provisions for the reopening of an estate inquiry, but since the Native Commissioner acts in an administrative capacity (see Sigcau *v.* Sigcau, 1941 C.P.D. 71), he has the power to recall his decision on good cause being shown and provided it has not been acted upon by the Registrar of Deeds. In the circumstances, no object will be served in granting a postponement which is refused.

On application by counsel for appellant leave is granted to withdraw the appeal, appellant to pay costs.

For Appellant: Mr. Alison, Umtata.

For Respondent: In default.

CASE No. 50.

GADLENI MATOLENGWE *v.* **WIWI PATENI.**

UMTATA: 15th February, 1949. Before J. W. Sleigh, Esq., President, Bates and Bowen, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Damages—Seduction and pregnancy—Fine payable in cattle—Cattle of average mixed type found in native locations—Judgment of alternative value—Option of paying in cattle or in cash rests with defendant—If cattle conform to type plaintiff must accept them—Disputed as to type to be settled summarily by Native Commissioner.

Appeal from the Court of the Native Commissioner, Cofimvaba.

Sleigh (President) delivering the judgment of the Court:

Respondent obtained judgment in the Native Commissioner's Court for five head of cattle or their value £40 as damages for adultery with and pregnancy of his customary wife. From this judgment appellant appeals on the grounds (1) that the judgment is against the weight of evidence, and (2) that the Native Commissioner erred " in allowing judgment in the alternative value of £40 ".

There is ample evidence to support the Native Commissioner's finding that appellant committed adultery with respondent's wife and caused her pregnancy. The first ground of appeal consequently fails.

In regard to the second ground of appeal, a native who commits adultery or seduces a girl is, in Native Law, condemned to pay a fine in cattle [Bulukwana *v.* Nkobongeli, 1932 N.A.C. (C. & O.) 43]. The cattle so paid are of the average type usually found in native locations, and are mixed, that is, they may include calves as well as old animals [Kodisang *v.* Seakgela, 1945 N.A.C. (C. & O.) 51]. But it is the practice to claim in the summons, in the alternative, the monetary value of such cattle. As the claim is not for particular cattle it follows that it is not possible to prove the actual value of the cattle. The best a plaintiff can do is to prove the average value of the type of cattle usually paid as fine. If there is no such proof the practice is to give judgment for the accepted standard value which in the Transkeian Territories is £5 a beast. The defendant then has the option of paying either in cattle or in cash. If he decides to pay in cattle the plaintiff cannot reject some of the cattle because they are not worth £5 each. If the cattle tendered, taken as a whole, are of the type usually paid as fine, plaintiff must accept them even if their collective market value is less than the monetary value given in the judgment. If there is a dispute as to whether the cattle tendered are of a type usually paid in cases of this nature then, as is the practice in some districts, the dispute can be decided summarily by the Native Commissioner or by a person nominated by him (Mapango *v.* Zuma, 1 N.A.C. 207).

In the present case respondent states: "The average value of mixed cattle in this district is £8 per head." There is no evidence to refute this. It may be too high but, as I have pointed out, appellant has the option of paying in cattle which respondent cannot reject provided they conform to the type usually paid as fine.

The appeal is dismissed with costs.

For Appellant: Mr. Hughes, Umtata.

For Respondent: Mr. Muggleston, Umtata.

CASE No. 51.

SIMON LUZIPO *v.* GOEGENAH LUZIPO.

BUTTERWORTH: 17th January, 1949. Before J. O. Cornell, Esq., Acting President (Southern Division).

Native Divorce Case—Customary union followed by marriage of same woman—Nullity of marriage—Previous stuprum *at time of marriage—Essentials of relief—Ignorant at time of marriage that woman is with child by another man—Marriage is voidable—Distinction between void and voidable marriage—Condonation—Misconduct not condoned by obtaining damages under Native Custom from adulterer.*

In this matter plaintiff seeks as against defendant a decree declaring that the marriage between the parties solemnised on 20/4/48 at the Ndakana Bantu Presbyterian Church, in the district of Ngqamakwe, is null and void *ab initio* on the grounds of defendant's previous *stuprum*. The action was not contested by defendant.

The parties are Natives residing in these Territories and the marriage has been duly proved. Plaintiff in his evidence discloses that about October, 1945, he left his home, which was his father's kraal in Ndakana Location, Ngqamakwe, to go and work in Cape Town. At that time a native customary union subsisted between the parties to whom a child had then been born. Plaintiff returned from work in December, 1947, to find defendant and his child still at his home. It seems that on his return home, discussion took place as a result of which the union between the parties was converted into a marriage by Christian rites on 20th April, 1948. Between the date of plaintiff's return home and the date of the civil marriage plaintiff did not cohabit with defendant because she said she was sick. After the solemnisation of the civil rites marriage, plaintiff had intercourse with defendant and then had his suspicions aroused that she was pregnant. On the 27th April, 1948, he took her to a doctor who confirmed that she was pregnant. After denying her condition, defendant two days later admitted that she was pregnant and named the man responsible. Thereafter plaintiff sent defendant with his brother to defendant's paramour, who admitted being responsible for her condition and who paid damages in the sum of £16. At some time later plaintiff rejected defendant and drove her away from his kraal. No date of rejection is given but it is safe to assume that this took place before issue of summons on the 3rd July, 1948.

These facts now recounted are not contradicted and must be accepted. It is clear therefrom that the child defendant was carrying on 20th April, 1948, could not have been plaintiff's child and by reason thereof plaintiff asks that the marriage be declared null and void *ab initio*. Van Zyl in his *Judicial Practice in S.A.*, at p. 697 of the 3rd Edition, asserts that the real ground for nullity is that the woman is not a virgin at the time of marriage and that the husband is not the person responsible for the loss of virginity. This question is, however, very fully discussed in the case of Stander *v.* Stander (1929 A.D. 351 *et seq.*) and the Court there arrived at the conclusion that all the authorities laid down that loss of virginity alone was insufficient to warrant a marriage being set aside, but that where a woman is at the time of marriage pregnant by a man other than he whom she is marrying, the latter may have the marriage set aside. In this matter, therefore, the fact that the parties were man and wife by a customary union at the time of the solemnization of the civil rites marriage does not affect the issue. Defendant was clearly not a virgin on the 20th April, 1948, but plaintiff is not debarred by that fact from seeking relief. In the report of the case of Fietze *v.* Fietze (1913 E.D.L.D. 170), *Sheil, J.*, at p. 173 says: "It has been contended, however, on behalf of the defendant that, even if the native Hekeni were the father of her child, still the plaintiff cannot succeed in this action (1st) because he seduced the defendant and had frequent intercourse with her before marriage, and has not come to the Court with clean hands, and (2nd) that after he became aware that she had had carnal intercourse with Hekeni he condoned the offence. As to the first of these defences, there certainly are some Roman Dutch authorities which support the view that a husband who has seduced his wife before marriage cannot succeed in such an action as the present." The decision in that matter was on the question of condonation and the learned presiding Judge takes the question of the plaintiff not having clean hands no further. However in B (otherwise S) *v.* S (1916 C.P.D. 109) where the plaintiff was the wife who sued for nullity on the grounds that defendant,

her husband, was impotent, succeeded, although at the time she instituted action, she was pregnant by another man. At p. 112, *Kotze, J.*, remarks: "In the event of a decree of nullity being granted, and the marriage between plaintiff and defendant declared null and void *ab initio,* there would be no legal impediment to the step which the plaintiff and V. hope to take. [*Holl. Consult.*, Vol. 3, Rotterdam, Consult., ult., *Voet* (25.7.9); Schorer *ad Grot.*, 1. 12. Sec. 9, n 7 and 8], whereas if the Court were to dismiss the plaintiff's suit and to hold that she has committed adultery with V, they could not legally inter-marry. (Cloete *v.* Resident Magistrate of Elliot, 1914 C.P.D. 1075)." The Court in that matter believed the plaintiff and declared the marriage null and void *ab initio.* In Theron *v.* Theron (1924 A.D. 244) the question as to whether premarital misconduct on the part of the husband or wife may be a ground for a decree of judicial separation was considered and the conclusion arrived at was that premarital conduct *per se* was not a ground but that such conduct, if it is of such a character as to render continued conjugal cohabitation unbearable, may be grounds. In Smith *v.* Smith [1948 (4) S.A.L.R. 61], *Selke, J.*, says at p. 68: "Further it seems clear that the effect of a Court's order of declaring a marriage null and void for want of consent is retroactive to the time of the marriage ceremony, and that, thus, the facts that on August 14th, 1947, the plaintiff ran away with McConnell and has ever since lived with him as his wife, and now has a child by him, constitute no bar to her being granted the relief for which she asks in this action." There is therefore no doubt that although plaintiff did cohabit with and presumably deflower defendant before their civil rites marriage, that conduct does not debar him from asking this Court for relief.

In most of the decisions consulted in this matter, there has emerged the fact that where nullity is sought and granted the marriage has been declared null and void *ab initio.* The leading case is Horak *v.* Horak (3 S. 389) and in this judgment *Voet* (24.2.15) is quoted *in extenso* and Van Leeuwen's *Censura Forensis* (1.15.10) is quoted in confirmation thus: "If a man, in ignorance, marry, as a virgin, a woman who has been already deflowered, and is found to be pregnant, after reconciliation attempted, it must be conceded to the husband that he may put away the woman who has thus deceived him—and in that case the marriage is dissolved, not only as to cohabitation, but as to the bonds, so that the man may marry another, and the deflowered woman may also marry another, even her deflowerer, unless the husband, with knowledge of the deflowering, shall have rendered conjugal rights to the deflowered wife, in which case he seems to have condoned the offence, as has been before said, in regard to the tacit remission to adultery. But in this case the marriage is not so much dissolved, as declared to have been void from the beginning." In Smith *v.* Smith (*supra*), Fietze *v.* Fietze (*supra*) and B (otherwise S) *v.* S (*supra*), the marriages were declared null and void *ab initio.* But I think there must be a clear distinction made between (1) a marriage contract which, owing to the incapacity of the parties, can never be a valid and recognised contract as a marriage between parties of prohibited degrees of consanguinity and (2) a marriage between two persons one of whom has practised a fraud or deceit on the other. In the first the law prohibits the contract but in the second, the injured party may ratify the contract by condoning the offence. Thus a marriage such as the one in question is voidable at the instance of the plaintiff—which is wat Maasdorp *Institutes of S.A. Law*, Vol. 1, p. 87, 5th Edition, says. The passage from Van Leeuwen's *Censura Forensis* (1.15.10) quoted *supra* lends support to this contention while it seems clear from *Voet* (24.2.15) that that is what was meant. In Van Leeuwen's *Commentaries on Roman Dutch Law by Dekker* (Kotze's Translation), Vol. 1 at p. 122, Sec. 5, appears this passage: "Likewise in case a marriage has been contracted with a person, who, by nature of some incurable defect, is incapable of procreating, such a marriage will, upon petition of the injured party be declared invalid, indeed legally dissolved and the injured spouse permitted to contract a lawful marriage with another person: *Arg.* 1 10 *cum anth. seq. Col. de Repud. L.* 39. *ID. de Jure Rot.* Christin Vol 1 *Decis* 338 Vol. 5 *Decis* 192 as was understood in the judgment of the Court of Holland April 24th 1592 between Mrs. Maria van Bekestein and Dirk Eyk van Howe." Plaintiff's marriage in this matter is therefore voidable at his instance. The fact that he claimed and obtained damages for defendant's misconduct, cannot be considered to be condonation. All authorities decide quite clearly that condonation may only be taken as proved when the injured party has with knowledge of the offence, had conjugal relations with the offending party. There is thus no evidence to this effect in this matter and while the decision herein will be that the marriage solemnised by plaintiff and defendant on the 20th April, 1948, is declared null

and void *ab initio,* such a decision does not indicate that the payment to and acceptance by plaintiff of damages for defendant's misconduct has escaped consideration. At first sight this action on plaintiff's part appears to be anomalous for he has asked this Court to declare his marriage null and void and at the same time accepted a monetary payment in respect of a right apparently flowing from such an invalid contract. But it must not be overlooked that only the civil or Christian rites marriage is in consideration here. No prayer is made in regard to the customary union from which a legal right to obtain damages for his wife's misconduct flows and plaintiff is not debarred by Native Custom from exercising his legal rights thereunder. In B (otherwise S) *v.* S (*supra*) an action for damages by defendant S in respect of B's misconduct with V failed with the granting of the decree declaring the marriage null and void *ab initio* and it seemed at first sight that similar considerations should apply in this matter. But it is considered that plaintiff's acceptance of damages did not stop him from seeking dissolution of his marriage for the reason that the right of action therefor flows from the customary union and not from the invalid civil rites marriage.

The decree declaring plaintiff's marriage null and void *ab initio* is granted as prayed.

CASE No. 52.

ELLIOT MAZWI *v.* SOPHIE MAZWI.

UMTATA: 10th February, 1949. Before J. W. Sleigh, Esq., President (Southern Division).

Native Divorce Case—Divorce on ground of desertion—Defendant in default at the trial and on return day—Restitution order—Service must, if possible, be personal —Court must be satisfied not only that defendant received the process but that he understood its purport.

Divorce case from the Court of the Native Commissioner, Umtata.

Sleigh (President) delivering the judgment of the Court:

The summons in an action for restitution of conjugal rights was served on defendant personally at No. 6 Johannes Road, Sophiatown, Johannesburg. At the hearing defendant was in default. The order was granted and the rule *nisi* was served on defendant's mother at the same address. In the Messenger's return it is stated: "Defendant was not at home at the time of service." The matter now comes before the Court for disposal. Defendant is in default, and application is made for a decree of divorce. Plaintiff is his affidavit declares that defendant has failed to restore conjugal rights and that she still resides with her mother at No. 6 Johannes Road, Sophiatown. The question is whether the service is in order.

Section 20 (1) of the Rules of the Native Divorce Court provides *inter alia* that process of the Court may be served upon the person affected "by delivery of a copy thereof at the said person's residence or place of business or employment to some person apparently not less than sixteen years of age who apparently resides or is employed there." On the face of it, therefore, the service of the rule *nisi* in the present case is in order. But rule 20 (3) provides that "The Court may in any case where there is reason to doubt whether the process served has come to the actual knowledge of the party concerned treat such service as invalid."

Now I think there can be little doubt, having regard to plaintiff's affidavit and the Messenger's endorsement of service, that defendant received the process, but I do not think that that is sufficient. Many natives cannot read and even those who are able to do so would acquire a very vague idea of what is expected of them from a mere perusal of the document. In my opinion rule 20 (3) means that the Court may treat a service, which is not personal, as invalid if it has a doubt whether the party concerned knows and understands the contents of the process served. I have this doubt in the present case. Natives frequently confuse the purport of process of the Court. In any event I have no means of satisfying myself on this point.

In Africa *v.* Africa (1944 C.P.D. 78) it was laid down by the Cape Court that the rule *nisi* in a case of restitution of conjugal rights should be served on the defendant personally. This, as far as I am aware, has always been the procedure in this Division of the Native Divorce Court, unless it is clear that defendant is

evading personal service, or the circumstances are otherwise exceptional. In other words, where personal service can be effected it should be done.

In the present case the service will be treated as invalid, but the dates will be extended so that the rule *nisi* may be served afresh if so desired.

For Plaintiff: Mr. Muggleston, Umtata.

For Defendant: In default.